JD(SF)–72-03
Oklahoma City, OK

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

VELOCITY EXPRESS, INC., formerly known as
CORPORATE EXPRESS DELIVERY SYSTEMS

and Case 17-CA-20076-1

TEAMSTERS LOCAL 886, affiliated with
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, AFL-CIO, CLC

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SUPPLEMENTAL DECISION

Statement of the Case

John J. McCarrick, Administrative Law Judge: This case was tried before me in Oklahoma City, Oklahoma on July 22, 2003 upon the Compliance Specification issued by the Regional Director for Region 17 of the National Labor Relations Board (Board). On December 19, 2000, the Board issued its Decision and Order[1] directing, *inter alia*, that Respondent make whole Joseph Bennett[2], Edwin Kirk and Hildegard Kirk for any loss of earnings or other benefits suffered as a result of the discrimination against them. Thereafter on August 8, 2002, the United States Court of Appeals for the District of Columbia Circuit issued its Judgment[3] enforcing the Board's Decision and Order. Having been unable to reach an agreement with the Board concerning the amount of backpay due to the above named discriminatees, Respondent, Charging Party and the Regional Director for Region 17 entered

[1] Corporate Express Delivery Systems, 332 NLRB No. 144 (2000)

[2] At the hearing the parties offered a Stipulation Consenting to Installment Payment Schedule approved by the Acting Regional Director for Region 17 on July 21, 2003, that provides Respondent has agreed to make whole Joseph Bennett in the sum of $34,000 to be paid in 12 equal installments commencing July 25, 2003, in full settlement of Bennett's backpay claims in this case. General Counsel's Exhibit 2.

[3] D.C. Circuit No. 01-1058, Unpublished Memorandum filed June 11, 2002.

into a stipulation on January 18, 2003, that provided the only issue was the amount of backpay due to the three discriminatees. On February 26, 2003, the Regional Director for Region 17 issued the Compliance Specification[4] herein and on March 19, 2003, Respondent filed its Answer to the Compliance Specification and denied that any of the discriminatees are due backpay.

The principal issues presented for decision are whether General Counsel's gross backpay formula is reasonable and whether Respondent proved any of its affirmative defenses.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs of the parties, I make the following:

Findings and Conclusions

1. The Underlying Unfair Labor Practice Case

Respondent has been engaged in providing same-day delivery services in Oklahoma City, Oklahoma. Respondent employed both owner/operators and so called company drivers in its delivery system.

In its December 19, 2000 Decision, the Board adopted the findings and conclusions of Administrative Law Judge Pargen Robertson that Respondent unlawfully discharged its employees Joseph Bennett, Edwin Kirk and HIldegard Kirk.

As a result the Board Order requires Respondent to offer reinstatement to and make whole Bennett and the Kirks.

2. The General Counsel's Gross Backpay Formula

Robert Fetsch (Fetsch), Region 17 Compliance Officer, testified that he prepared the compliance specifications. Amendments to the compliance specifications were necessary as additional information was provided at various times before and during the hearing.

Fetsch testified that the beginning of the backpay period for each of the discriminatees was based upon the administrative law judge's finding that they were unlawfully terminated on March 9, 1999. The backpay period for the discriminatees ended the first week of October 2002 with the offer of reinstatement letters from Respondent dated October 3, 2002.

For Edwin Kirk, Fetsch used Kirk's most recent weekly base pay of $760 together with his weekly freight rate of 254.40 to calculate his weekly salary of $1014.40. Fetsch used the same formula to calculate Hildegard Kirk's weekly salary. However, Fetsch did not use Hildegard's $380 weekly base pay at the time of her termination. Fetsch felt it was more equitable to use Hildegard's 1999 average $591.25 weekly rate since her weekly rate had been reduced to $380 only a week before her termination. There is evidence that in the past Respondent had reassigned Hildegard to a more lucrative route upon her request. After her

[4] At the hearing Counsel for the General Counsel amended the Backpay Specification by offering revised Appendix B-1 and B-2 which reflect adjustments to gross backpay for Edwin Kirk and Hildegard Kirk for the first quarter of 1999. General Counsel's Exhibit 3.

reduction in pay just before her termination, Hildegard requested reassignment to the higher paying route. Her manager, Carol Miller, told Hildegard that it would not be a problem to add something to her route to get it back to where Hildegard originally had been. However, Hildegard was terminated before Respondent could act upon her request.

The Board found the discriminatees were employee owner/operators of Respondent. As owner/operators, the discriminatees were responsible for certain expenses that were deducted from their compensation by Respondent. Since these expenses were built into the discriminatees' compensation, the Region concluded that an accommodation had to be made for all related employment expenses. Fetsch testified that those expenses included vehicle and related expenses. Both Edwin and Hildegard Kirk testified concerning their estimates of various expenses including van payments, gasoline, oil changes, repairs, tires, van washes, insurance, and pager expenses. Fetsch testified that the Region chose not to use the standard deduction for business expenses the Kirks claimed on their tax returns to calculate gross backpay because to do so would have left the Kirks with little or no backpay and would not represent the actual state of their take home pay with Respondent. In calculating the Kirk's employment expenses while employed with Respondent, Fetsch took estimated annual expenses for each expense category from the Kirks and prorated those over calendar quarters or partial calendar quarters. Van payments were not deducted to compute gross backpay since the Kirks continued to incur these expenses after they were terminated. Similarly, expenses the Kirks continued to incur after their terminations were not deducted from gross backpay, including auto taxes and license fees. Van insurance was calculated by deducting the difference between the amount paid while working for Respondent and the lesser amount of insurance obtained in interim employment.

In calculating interim earnings, Fetsch testified that the amounts claimed by the Kirks on their Federal Income Tax returns for business expenses were used to calculate interim expenses to offset interim earnings that resulted in net interim earnings.[5] There is no dispute concerning the accuracy of the amounts used to compute interim earnings.

3. Analysis

a. Applicable Legal Principals

It is well settled that the finding of an unfair labor practice is presumptive proof that some backpay is owed NLRB v. *Mastro Plastics Corporation and French American Reeds Manufacturing Company,* 354 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966)), and that in a backpay proceeding the sole burden on the General Counsel is to show the gross amounts of backpay due--the amount the employees would have received but for the employer's illegal conduct. *Virginia Electric and Power Company v. N.L.R.B.,* 319 U.S. 533, 544 (1943). Once that has been established, "the burden is upon the employer to establish facts which would ... mitigate that liability." *NLRB v. Brown & Root, Inc., et al.*, 311 F.2d 447, 454 (8th Cir. 1963). It is further well established that any formula which approximates what discriminatees would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary in the circumstances. *International Association of Bridge, Structural and Reinforced Iron Workers Union, Local 378, AFL-CIO (Judson Steel Corporation),*

[5] Interim expenses were calculated for Edwin Kirk using his Federal Income Tax Return Schedule C, which utilized a standard mileage deduction since Edwin was self-employed. No interim expenses were found for Hildegard Kirk as her interim earnings came as an hourly employee.

227 NLRB 692 (1977); *N.L.R.B. v. Brown & Root, Inc., supra* at 452; *East Texas Steel Castings Company, Inc.,* 116 NLRB 1336 (1956), enfd. 255 F.2d 284 (5th Cir. 1958); *Avon Convalescent Hospital,* 219 NLRB 1210, 1213 (1975). In this regard, the Board has stated that "it is for the [Administrative Law Judge] to consider whether the General Counsel's formula is the proper one in view of all the facts adduced by the parties and to make recommendations to the Board as to the most accurate method of determining the amounts due." (Emphasis supplied.) *American Manufacturing Company of Texas*, 167 NLRB 520. The Board has long recognized the value of utilizing social security records and income tax returns in determining interim income, and has found that "poor record keeping, uncertainty as to memory, and perhaps exaggeration" do not automatically disqualify an employee from receiving backpay. *Patrick F. Izzi, d/b/a Pat Izzi Trucking Company,* 162 NLRB 242, 245 (1966), *enfd.* 395 F.2d 241 (1st Cir. 1968)

b. The Gross Backpay Formula

It is well established that any formula which approximates what discriminatees would have earned had they not been discriminated against is acceptable and need not attain mathematical precision as long as it is not arbitrary or unreasonable. *Boyer Ford Trucks,* 270 NLRB 1133, 1138 (1984; *International Association of Bridge, Structural and Reinforced Iron Workers Union, Local 378, AFL-CIO (Judson Steel Corporation),* 227 NLRB 692 (1977).

Both the Board and the Administrative Law Judge found that the owner/operator discriminatees herein were responsible for certain expenses that were deducted from their pay including insurance on their vehicles, pager expenses, uniforms, drug tests and physical exams. Neither the Board nor the ALJ found that vehicle expenses, other than insurance, were deducted from the discriminatees' compensation.

I find that the gross backpay formula used for the Kirks was not reasonable. The Board found the Kirks were employees not self-employed independent contractors. The goal of a backpay proceeding is to determine what the discriminatees would have earned had they not been discriminated against. The novel approach utilized by the Region in deducting expenses incurred by the Kirks from gross backpay, over and above that which Respondent deducted for insurance and pagers, is similar to the calculation used for determining interim earnings for self employed discriminatees.[6] It is inappropriate to use a profit and loss approach to calculating gross backpay for discriminatees in the instant case, particularly where the Board found the discriminatees, "have no proprietary interest in their routes and no significant opportunity for entrepreneurial gain or loss." *Corporate Express Delivery Systems, supra,* slip op. page 1. The only appropriate deductions from gross backpay were vehicle insurance and pagers, which

[6] Inexplicably the Region reasoned that it would not deduct vehicle payments from gross backpay since the discriminatees continued to incur these expenses after they were fired. Using this rationale all vehicle expenses, including gas and oil, tires, vehicle washes and repairs, should be excluded since they were presumably incurred by the Kirks after their terminations.

Respondent automatically deducted from the Kirks paychecks, since this represents what the Kirks would have earned but for Respondent's discrimination.[7]

In calculating Hildegard Kirk's gross backpay, the Region utilized her 1999 average $591.25 weekly rate since Hildegard's weekly rate had been reduced to $380 only a week before her termination. I find this formula is reasonable. Respondent argues that there is no evidence to conclude that Hildegard Kirk would have been restored to her previous weekly rate of $591.25. However, there is evidence that Hildegard had previously been granted a requested route change and more importantly shortly before her termination, her supervisor had promised Hildegard that her route would be supplemented to get her back to where she had been originally. Given this promise and past practice, it is reasonable to assume Hildegard Kirk would have earned $591.25 per week if she had not been unlawfully terminated.

c. Interim Earnings

The Region offset interim expenses in computing interim earnings for Edwin Kirk. For at least a portion of the time Edwin had interim earnings they were the product of entrepreneurial self-employment. In calculating Edwin Kirk's interim earnings from self-employment, the Region used his Federal Income Tax return to determine both his earnings and his operating expenses. This is the standard method in calculating interim earnings from self-employment. *NLRB Casehandling Manual Part Three-Compliance Proceedings Section 10541.3*. See also *Synergy Gas Corp*., 302 NLRB 130 (1991). Respondent contends that the standard deduction should have been used both to calculate interim earnings and gross backpay. This argument is fundamentally flawed since it assumes that both Edwin and Hildegard Kirk were self-employed while working for Respondent. This argument has long been settled by both the Board and the Court of Appeals. Use of the standard deduction was appropriate to calculate Edwin Kirk's interim earnings since he was self-employed during the backpay period. It would be inappropriate, as noted above, to use the expenses from the standard deduction to diminish the Kirk's gross backpay when they were Respondent's employees. Since Respondent was contesting only the formula for interim earnings and not their accuracy, I find that Edwin Kirk's interim expenses were appropriately determined.

d. The Backpay Period Ended October 3, 2002.

The backpay period commenced with Respondent's unlawful terminations of Edwin and Hildegard Kirk on March 9, 1999. Respondent contends that the Kirks abandoned interest in working for Respondent. In support of this argument, Respondent offered the letters dated January 26, 2003, the Kirk's sent to Respondent declining offers of reinstatement.[8] In the letters the Kirks both state that they cannot accept offers of reinstatement since Bill Kennedy was still the site manager. Respondent reasons that the Kirks must have abandoned their jobs, since Kennedy has always been site manager and therefore earlier offers of reinstatement would

[7] The Region deducted the difference between what the Kirks paid Respondent for insurance and what they later obtained for insurance on their vehicles. This formula does not accurately represent the Kirk's compensation from Respondent. Since it is clear they were obligated to pay insurance from their paychecks, only the actual amount deducted from their pay accurately reflects their salary. The evidence shows that both Edwin and Hildegard Kirk paid Respondent $390.00 per quarter for insurance. The Kirks each paid $29.25 per quarter for pagers. General Counsel's exhibits 7 and 8.

[8] See Respondent's Exhibits 3 and 4.

likewise have been rejected. There is no evidence that before Respondent's October 3, 2002 offers of reinstatement, the Kirks in any way indicated abandonment of their jobs.

The Board has long held that employee's statements concerning their desire for reinstatement made prior to a valid offer of reinstatement are unreliable as an indicator of an employee's true interest in reinstatement. *Big Three Industrial Gas and Equipment Co.,* 263 NLRB 1189, 1203 (1982); *Lyman Steel Co.,* 246 NLRB 712, 714 (1979). Until a valid offer of reinstatement has been tendered, the discriminatee's intent cannot be discerned. While it is clear that the Kirks declined offers of reinstatement after October 3, 2002, there is no evidence of what their intent was prior to that time. I find no probative evidence that supports a conclusion the Kirks abandoned their jobs with Respondent prior to October 3, 2002.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

SUPPLEMENTAL ORDER[9]

IT IS HEREBY ORDERED that Respondent, Velocity Express, Inc., formerly known as Corporate Express Delivery Systems, forthwith pay to each of the following persons backpay in the amounts set opposite their name, plus interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), as required by the Board's Order of December 19, 2000:

Edwin Kirk	$136,818.13
Hildegard Kirk	$12,000.37
TOTAL NET BACKPAY	$148,818.50

Dated at San Francisco, California this 30th day of September 2003.

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John J. McCarrick
Administrative Law Judge

[9] In the event no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusion, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.